A

## ANDREW CHRISTOPHER CHUAH CHOONG ENG CHUAN

**v.**

B

## OOI WOON CHEE & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
AUGUSTINE PAUL JCA
C [CIVIL APPEAL NO: W-02-442-2003]
10 OCTOBER 2006

***COMPANY LAW:*** *Winding up - Proof of debts - Decision by liquidators to reject appellant's proof of debt of loans to company - Whether appellant failed to prove that loans taken by company - Whether money received for benefit of third parties - Whether liquidators acted arbitrarily and without good reasons - Whether there was privity of contract between appellant and third parties*

D

E ***COMPANY LAW:*** *Winding up - Liquidator - Decision by liquidators to reject appellant's proof of debt of loans to company - Whether appellant failed to prove that loans taken by company - Whether money received for benefit of third parties - Whether liquidators acted arbitrarily and without good reasons - Whether there was privity of contract between*
F *appellant and third parties*

***CONTRACT:*** *Privity - Agency - Decision by liquidators to reject appellant's proof of debt of loans to company - Whether money received for benefit of third parties - Whether company acted only as agent for third parties to knowledge of appellant - Whether there was privity of*
G *contract between appellant and third parties - Contracts Act 1950, s. 183*

The appellant was a client of one Labuan Securities Sdn Bhd ('LSSB'), a stock broking company, and had given several loans (including one amounting to USD3.8 million) to LSSB. To settle
H LSSB's financial problems with its creditors, a Special Administrator was appointed for LSSB as provided for under s. 24 of the Pengurusan Danaharta Nasional Berhad Act 1998. As a result of the appointment, a Transfer of Liability Agreement was entered into between the parties, and accordingly, all of LSSB's
I liabilities to its creditors were transferred to one Balforn Holdings Sdn Bhd ('Balforn') as "Special Purpose Vehicle" for the purpose of the proposal for settlement. Subsequently, Balforn was wound

up and the respondents were appointed as the liquidators at the creditors' meeting. The respondents as Balforn's liquidators invited the creditors to submit Proof of Debt through an advertisement placed in the New Straits Times. The appellant then submitted a Proof of Debt in Form 55 of the Companies (Winding-Up) Rules 1972 ('Rules') for the amount of USD5,169,154.76, SGD3,664,417.92 and RM42,165. The respondents rejected the appellant's Proof of Debt in Form 59 of the Rules on the ground that the money received was for the benefit of third parties and that LSSB was not the real borrower. The appellant was dissatisfied with the respondents' decision and thus filed an originating summons against the respondents seeking an order to reverse or vary the respondents' decision. The learned High Court judge was of the opinion that the only issue to be resolved was whether the appellant had successfully proved that the loans were taken by LSSB, and that the onus was on the appellant to prove as such. He held that the appellant had failed to prove that LSSB was the real borrower and that the respondents had neither acted arbitrarily nor rejected the application without reasons. He dismissed the appellant's application to reverse or vary the respondents' decision; hence, the present appeal.

**Held (dismissing the appeal)**
**Per Augustine Paul JCA:**

**(1)** The court will not interfere with a decision of a liquidator simply because its opinion might differ from that of the liquidator. Generally, the court will recognize that the discretion has been vested by statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law, or has not exercised his discretion *bona fide* or has acted in a way which no reasonable liquidator would have acted, or has taken into account entirely irrelevant considerations or when there is fraud. (para 10)

**(2)** The learned judge had taken into consideration the various documents tendered by both parties to support his conclusion that LSSB did not take the loan for its own benefit. In particular, he had considered LSSB's Audit Reports, which are a requirement of law, for the years 1997 and 1998 to show the movement of the company's financial activities. They did not reveal any loan taken from the appellant, as opposed to LSSB's Statement of Affairs which did so. But he rightly ruled

A that they were merely statements made by the company's directors on the company's assets and liabilities. He said correctly that the status of the Statement of Affairs was not the same as that of the company's Audit Reports which were audited by a professional auditor. The absence of the loans in
B the Audit Reports as explained by the respondents in their affidavits and the exhibits annexed showed that there was an understanding between LSSB and the appellant that the loan was taken for the benefit of LSSB's clients. In particular, exhs. "TMK3" and "TMK6" annexed to exh. "OWC3" in the
C affidavit affirmed by the first respondent on 8 June 2001 ('respondent's affidavit') revealed that the appellant had knowledge that the loans were taken for the benefit of third parties and that they were to charge their shares as security, which they did. In this regard a facsimile transmission dated 4
D December 1997 from the appellant to one Tan Miang Kieng, exhibited as "TMK7" annexed to exh. "OWC3" in the respondent's affidavit, showed that the appellant had in fact asked for additional securities such as land in Kuala Lumpur, Pulau Pinang and Bukit Mertajam to be provided by the third
E parties. As a matter of fact, exhs. "AC6" and "AC7" in the affidavit affirmed by the appellant on 16 May 2001 revealed that with regard to the loan of USD3.8 million, the securities had been taken into account by the appellant in calculating the amount due. (para 11)

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**(3)** Thus, the real borrowers were the third parties of which the appellant was aware. It was therefore clear that LSSB acted only as an agent for the real borrowers to the knowledge of the appellant. There was, therefore, privity of contract
G between the real borrowers, who were the principals, and the appellant. In accordance with the principle of law in *Montgomerie and Others v. United Kingdom Mutual Steamship Association*, such a contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only
H person who can sue is the principal and the only person who can be sued is the principal. This rule is embodied in s. 183 of the Contracts Act 1950. LSSB was thus not a debtor of the appellant, and the proof of debt filed by the appellant was therefore without any merit. (paras 11 & 12)

I

***Bahasa Malaysia*** *translation of headnotes*

Perayu adalah klien kepada Labuan Securities Sdn Bhd ('LSSB'), sebuah syarikat broker saham, dan telah memberi beberapa pinjaman kepada LSSB (termasuk satu pinjaman berjumlah USD3.8 juta). Bagi menyelesaikan masaalah kewangan LSSB dengan pemiutang-pemiutangnya, Pentadbir Khas telah dilantik untuk LSSB selaras dengan peruntukan s. 24 Akta Pengurusan Danaharta Nasional Berhad 1998. Ekoran perlantikan tersebut, satu Perjanjian Pemindahan Liabiliti telah dimeterai oleh pihak-pihak, dan berikutnya semua liabiliti LSSB kepada pemiutangnya telah dipindah kepada Balforn Holdings Sdn Bhd ('Balforn') selaku "Special Purpose Vehicle" bagi maksud cadangan penyelesaian. Balforn bagaimanapun telah digulung dan pada mesyuarat pemiutang-pemiutang responden dilantik sebagai penyelesainya. Responden kemudian meminta pemiutang-pemiutang supaya mengemukakan Bukti Hutang melalui pengiklanan di dalam New Straits Times. Berikutnya, perayu mengemukakan Bukti Hutang di dalam Borang 55 Peraturan-Peraturan Syarikat (Penggulungan) 1972 ('Peraturan') bagi jumlah USD5,169,154.76, SGD3,664,417.92 dan RM42,165. Bukti Hutang, namun begitu, telah ditolak oleh responden melalui Borang 59 Peraturan atas alasan bahawa wang yang diterima adalah untuk manfaat pihak ketiga dan bahawa LSSB bukan merupakan peminjam sebenar. Perayu tidak berpuas hati dengan keputusan responden, dan telah memfailkan saman pemula terhadap responden memohon perintah untuk mengakas atau mengubah keputusan tersebut. Yang arif hakim Mahkamah Tinggi berpendapat bahawa satu-satunya isu yang perlu diputuskan adalah sama ada perayu berjaya membuktikan bahawa pinjaman-pinjaman telah diambil oleh LSSB. Beliau bagaimanapun mendapati perayu gagal membuktikan bahawa LSSB adalah peminjam sebenar, selain memutuskan bahawa responden tidak bertindak secara sebelah pihak atau tanpa alasan apabila menolak permohonan. Yang arif hakim dengan itu menolak permohonan perayu untuk mengakas atau mengubah keputusan responden. Ini adalah rayuan perayu terhadap keputusan tersebut.

**Diputuskan (menolak rayuan)**
**Oleh Augustine Paul HMR:**

**(1)** Mahkamah tidak akan campur tangan dalam keputusan yang dibuat oleh penyelesai semata-mata kerana pendapatnya berbeza dengan pendapat penyelesai. Secara amnya, mahkamah memperaku bahawa statut telah memberi budibicara kepada

penyelesai, dan tidak akan campur tangan kecuali jika beliau dibuktikan tidak mengarahkan dirinya kepada persoalan-persoalan yang betul atau telah membuat kesilapan undang-undang, atau gagal melaksanakan budibicara secara *bona fide* atau telah bertindak dengan cara yang tidak mungkin dibuat oleh seorang yang munasabah, atau telah mengambilkira pertimbangan yang langsung tidak relevan atau jika berlaku frod.

**(2)** Yang arif hakim telah memberi pertimbangan kepada berbagai dokumen yang dikemukakan oleh kedua belah pihak bagi menyokong rumusannya bahawa LSSB tidak mengambil pinjaman untuk manfaatnya sendiri. Khususnya, beliau mengambilkira Laporan Odit LSSB, yang merupakan satu keperluan undang-undang, bagi tahun-tahun 1997 dan 1998 untuk menunjukkan pergerakan aktiviti kewangan syarikat. Laporan tersebut tidak menunjukkan sebarang pinjaman diambil dari perayu. Namun begitu, Penyata Hal-Ehwal LSSB menunjukkan sebaliknya. Walau bagaimanapun, penyata tersebut hanyalah penyata yang dibuat oleh pengarah-pengarah syarikat berkaitan aset dan liabiliti syarikat. Hakim telah menyatakan dengan betulnya bahawa Penyata Hal-Ehwal adalah tidak sama dengan Laporan Odit syarikat yang diodit oleh juruodit-juruodit profesional. Ketiadaan pinjaman di dalam Laporan Odit seperti yang dijelaskan oleh responden dalam afidavit-afidavit mereka dan dalam eksibit-eksibit yang dikepilkan menunjukkan bahawa terdapat satu persefahaman di antara LSSB dan perayu bahawa pinjaman adalah diambil untuk manfaat klien-kilen LSSB. Terkhusus eks. "TMK3" dan "TMK6" yang dikepil kepada eks. "OWC3" di dalam afidavit yang diikrar oleh responden pertama pada 8 Jun 2001 ('afidavit responden') menunjukkan bahawa perayu tahu bahawa pinjaman-pinjaman diambil untuk manfaat pihak-pihak ketiga yang telah mencagar saham-saham mereka sebagai jaminan. Dalam hubungan ini, penghantaran facsimile bertarikh 4 Disember 1997 dari perayu kepada seorang Tan Miang Kieng, yang ditanda sebagai eks. "TMK7" dan dikepil kepada eks. "OWC3" di dalam afidavit responden, menunjukkan bahawa perayu sebenarnya telah meminta jaminan tambahan seperti tanah-tanah di Kuala Lumpur, Pulau Pinang dan Bukit Mertajam dari pihak-pihak ketiga berkenaan. Hakikatnya, eks. "AC6" dan "AC7" di dalam afidavit yang diikrarkan oleh

perayu pada 16 Mei 2001 menunjukkan bahawa, berkaitan pinjaman USD3.8 juta, jaminan-jaminan yang ada telah diambilkira oleh perayu semasa mengira jumlah yang terhutang.

**(3)** Oleh yang demikian, peminjam sebenar adalah pihak-pihak ketiga yang sememangnya disedari oleh perayu. Adalah jelas bahawa LSSB hanya bertindak sebagai agen kepada peminjam sebenar dengan pengetahuan perayu. Oleh itu, wujud priviti kontrak antara peminjam sebenar, sebagai prinsipal, dengan perayu. Maka, berdasarkan prinsip undang-undang di dalam *Montgomerie and Others v. United Kingdom Mutual Steamship Association*, kontrak sedemikian adalah kontrak oleh prinsipal dan bukannya oleh agen, dan *prima facie*, di sisi common law, yang boleh mendakwa adalah prinsipal dan yang boleh didakwa juga adalah prinsipal. Kaedah ini diterap ke dalam s. 183 Akta Kontrak 1950. LSSB dengan itu bukanlah penghutang perayu, berakibat bukti hutang yang difailkan perayu tidak bermerit.

**Case(s) referred to:**
*Avon Downs Pty Ltd v. FC of T [1949] 78 CLR 353* ***(refd)***
*Leon v. York-O-Matic [1966] 1 WLR 1450* ***(refd)***
*Montgomerie and Others v. United Kingdom Mutual Steamship Association [1891] 1 QB 370* ***(foll)***
*Plantation Agencies Sdn Bhd v. Hj Ariffin Hj Ismail [1978] 1 MLJ 219* ***(refd)***
*Re Edennote Ltd [1996] 2 BCLC 389* ***(refd)***
*Re Kentwood Constructions Ltd [1960] 2 All ER 655* ***(refd)***
*Re Mineral Securities Ltd [1973] 2 NSWLR 207* ***(refd)***
*Re Teck Hock & Co (Pte) Ltd; Morgan Guaranty Trust Co of New York v. Wong Tui San & Anor (CSLR) XX [5132]* ***(refd)***
*Tanning Research Laboratories Inc v. O'Brien [1990] 169 CLR 332* ***(refd)***
*Westpac Banking Corporation & Others v. Totterdell and Another [1998] 25 ACSR 769* ***(refd)***
*Yeomans v. Walker & Anor [1986] 10 ACLR 753* ***(refd)***

**Legislation referred to:**
Companies (Winding-Up) Rules 1972, rr. 92, 93
Contracts Act 1950, s. 183
Pengurusan Danaharta Nasional Berhad Act 1998, s. 24

**Other source(s) referred to:**
*Halsbury's Laws of England,* 4th edn, vol 7, p 745

*For the appellant - Edwin Seibel (G Muden Chua with him); M/s Sheah, Tan & Rahman*

*For the respondents - KA Gan (ML Chai with him); M/s Lee Hishamuddin Allen & Gledhill*

*[Appeal from High Court, Kuala Lumpur; Originating Summons No: D4-24-114-2001]*

*Reported by Suresh Nathan*

## JUDGMENT

**Augustine Paul JCA:**

**[1]** The appellant (the plaintiff in the High Court) was a client of Labuan Securities Sdn. Bhd. (hereinafter referred to as "LSSB"), a stock broking company, and had given several loans to LSSB. On 12 February 1999, a Special Administrator was appointed for LSSB as provided for under s. 24 of the Pengurusan Danaharta Nasional Berhad Act 1998 to settle LSSB's financial problems with its creditors. As a result of the appointment a Transfer of Liability Agreement dated 30 October 2000 was entered into between the parties. Accordingly, all of LSSB's liabilities to its creditors as of 2 September 1999 were transferred to Balforn Holdings Sdn. Bhd. (hereinafter referred to as "Balforn") as "Special Purpose Vehicle" for the purpose of the proposal for settlement. Subsequently, Balforn was wound up and on 17 January 2001, the respondents were appointed as the liquidators at the creditors meeting. On 1 March 2001, the respondents as Balforn's liquidators invited the creditors to submit proof of debt through an advertisement placed in the New Straits Times. The appellant then submitted a proof of debt in Form 55 of the Companies (Winding-Up) Rules 1972 (hereinafter referred to as "the rules") for the amount of USD5,169,154.76, SGD3,664,417.92 and RM42,165. On 24 May 2001 the respondents rejected the appellant's proof of debt in Form 59 of the rules (hereinafter referred to as the "respondents' decision"). The appellant was dissatisfied with the respondents' decision and thus filed an originating summons against the respondents seeking an order to reverse or vary the respondents' decision.

**Submission By The Appellant In The High Court**

**[2]** By a letter of offer dated 4 July 1997 (hereinafter referred to as the "letter of offer"), it was agreed by both the appellant and LSSB that the appellant would advance a sum of USD3.8 million only to LSSB as a loan at an interest to be calculated in accordance with the terms of the letter of offer (hereinafter referred to as the "loan facilities"). Pursuant to the letter of offer and subsequent verbal agreements the appellant transmitted into LSSB's account the total sum which was more than what had been agreed upon. LSSB and the respondents did not deny the receipt of the sum advanced and it was not the appellant's concern as to whether or not LSSB gave the money to another party after such acceptance. It was also not denied by LSSB and the respondents that the money was transmitted into LSSB's account. The letter of offer was clearly signed by the authorized signatories of LSSB and was witnessed by an advocate and solicitor and its contents were admitted by the respondents in their submission. It was not proved that there was an understanding between the parties that the money was for the benefit of third parties. All the documents showed that LSSB was the receiver of the money. One Tan Eam Thong has admitted that LSSB had accepted the money from the appellant. The correspondence between the appellant and LSSB did not show that the money was for the benefit of Tan Eam Thong. If in fact the loan was made to Tan Eam Thong, the respondents did not explain in their affidavits the presence of the appellant's name in LSSB's statement of affairs.

**Submission By The Respondents In The High Court**

**[3]** The appellant's proof of debt was rejected by the respondents on the ground that the money received was for the benefit of third parties and that LSSB was not the real borrower. Even if the letter of offer was signed and accepted by LSSB it was the understanding between the parties that the loan facilities were for the benefit of LSSB's clients. LSSB only acted as an intermediary to arrange financial facilities for its clients for the purpose of purchasing shares at the Kuala Lumpur Stock Exchange (KLSE). There are documents to show that the appellant had knowledge that the loan was for the benefit of third parties and that they were to pledge their shares in respect of the loans which they did. There are also documents to show that the

A appellant had asked the third parties for additional securities such as land in Kuala Lumpur, Pulau Pinang and Bukit Mertajam for the loans. LSSB's Audited Accounts for the years 1997 and 1998 did not show the payment of any sum of money from the appellant to LSSB. If in fact the loan was taken for the benefit
B of LSSB the necessary details must have been shown in the accounts. The Transfer of Shares Confirmation Report indicated that shares were pledged by third parties who were the real borrowers. The letter from Tan Eam Thong, exhibited as exh. "TMK9" at p. 71 of exh. "OWC3" at encl. 6, confirmed that he
C was one of the beneficial receivers of the loan. Furthermore, the appellant made an offer to execute a new agreement to replace the letter of offer to show that Utama Impian Properties Sdn. Bhd. was one of the real borrowers. The appellant also did not deny that its companies Compstate Sdn. Bhd., Top Venue Sdn.
D Bhd. and Bakti Barat Sdn. Bhd. were also the real borrowers. Accordingly, it was contended that the respondents were correct in rejecting the appellant's proof of debt and that the decision must not be interfered with unless it "is such that no reasonable man could, properly instructed in the circumstances, arrive at it".
E The case of *Yeomans v. Walker & Anor* [1986] 10 ACLR 753 was relied on in support.

**Findings Of The High Court**

F **[4]** The learned judge of the High Court was of the opinion that the only issue to be resolved was whether the appellant had successfully proved that the loans were taken by LSSB. He said that the onus was on the appellant to prove that the loans were taken by LSSB and in support referred to cases such as *Westpac*
G *Banking Corporation & Others v. Totterdell and Another* [1998] 25 ACSR 769 and *Tanning Research Laboratories Inc. v. O'Brien* [1990] 169 CLR 332. He said that the appellant had failed to prove that LSSB was the real borrower. He also said that the respondents had not acted arbitrarily nor did they reject the application without
H reasons. As he said in his grounds of judgment:

> Dari sudut prinsip undang-undang adalah jelas pelikuidasi mempunyai budibicara untuk menerima atau menolak permohonan bukti hutang. Walaubagaimanapun, Mahkamah mempunyai bidangkuasa untuk menolak atau mengubah keputusan yang dibuat
I oleh pelikuidasi mengenai permohonan bukti hutang. (Sila lihat Kaedah 93, Kaedah Penggulungan Syarikat 1972). Sepertimana dengan mana-mana penggunaan budibicara, Mahkamah tidak

sewenang-wenangnya campur tangan melainkan jelas dan nyata pelikuidasi bertindak secara melulu (arbitrary) yakni tidak berpandu kepada prinsip-prinsip yang lumrah.

Alasan yang diberi oleh Defendan-Defendan adalah munasabah. Ini terbukti apabila 'pinjaman' yang dikatakan tidak wujud dalam lapuran odit LS bagi tahun-tahun berkenaan iaitu 1997 dan 1998. Adalah tidak dapat dinafikan bahawa lapuran odit tahunan ialah dokumen penting yang wajib dikemukakan mengikut peruntukan undang-undang bagi menunjukkan pergerakan aktiviti kewangan syarikat berdaftar. Sila lihat Seksyen 167,174 Akta Syarikat 1965). Lapuran-lapuran odit LS bagi tahun-tahun yang material menggambarkan kedudukan sebenar kewangan LS dan lapuran odit tersebut tidak menunjukkan terdapatnya pinjaman oleh LS daripada Plaintif. Justeru itu, pada hemat saya, pelikuidasi mempunyai asas yang munasabah untuk menolak bukti hutang Plaintif. Saya berpendapat adalah tidak wajar bagi pelikuidasi menerima permohonan bukti hutang jika lapuran odit syarikat gagal menunjukkan bukti hutang. Oleh yang demikian keputusan Defendan-Defendan menolak bukti hutang Plaintif adalah menggunakan budibicara yang betul. Saya tidak dapat menerima hujah pihak Plaintif bahawa terbukti yang LS adalah peminjam oleh kerana ada surat menyurat dan ada disebut dalam Statement of Affairs LS. Saya ingin menarik perhatian bahawa Statement of Affairs adalah penyataan oleh pengarah syarikat dalam penggulungan mengenai asset dan liabilities. Taraf Statement of Affairs dan surat menyurat tidak setaraf lapuran odit syarikat yang diodit oleh juruodit bertauliah.

Seperkara lagi banyak dokumen khasnya surat-surat dan faksimili yang dieksibitkan menunjukkan bahawa Plaintif mempunyai pengetahuan bahawa wang yang diterima tersebut adalah untuk faedah pelanggan-pelanggan LS bagi tujuan membiayai pembelian saham-saham di Bursa Saham Kuala Lumpur dan pelanggan-pelanggan tersebut akan mencagar saham-saham tersebut memihak kepada Plaintif.

Terdapat juga pelanggan (Tan Eam Thong) yang mengesahkan bahawa beliau merupakan penerima benefisial kepada pinjaman tersebut. Surat daripada Tan Eam Thong bertarikh 16/12/1997 ("MKT-9" di m/s 71 kepada Eksibit "OWC-3" Lampiran 6) mengesahkan bahawa dia merupakan penerima beneficial kepada pinjaman tersebut. Dalam hal ini Plaintif mengeksibitkan faksimili bertarikh 16/12/2001 (Eksibit "AC-1", Lampiran 12) yang menunjukkan Tan Eam Thong menyatakan beliau bukan benefisial dan menafikan telah menulis surat bertarikh 16/12/1997. Mengenai perkara ini tiada Afidavit Tan Eam Thong dikemukakan oleh Plaintif untuk menunjukkan samada beliau adalah salah seorang benefisial atau tidak.

A Plaintif mempunyai pengetahun bahawa Utama Impiana Properties Sdn. Bhd. dan juga 3 syarikat Plaintif sendiri iaitu Compstate Sdn. Bhd., Top Avenue Sdn. Bhd. dan Bakti Barat merupakan peminjam sebenar dan Plaintif tidak mempertikaikannya. Daripada Aifdavit-afidavit dan Eksibit-eksibit yang dilampirkan kedua-dua
B pihak menunjukkan bahawa wujudnya persefahaman bahawa wang pinjaman tersebut adalah untuk faedah pihak ketiga iaitu pelanggan-pelanggan LS. Plaintif hanya menyatakan bahawa wang tersebut telah diterima oleh LS tetapi gagal mengemukakan keterangan bahawa wang tersebut untuk faedah LS. Seandainya wang tersebut untuk faedah LS mengapakah Plaintif meminta
C cagaran saham-saham dan cagaran tambahan seperti hartanah daripada pelanggan LS.

**[5]** On 29 April 2003, the learned judge of the High Court dismissed with costs the appellant's application to reverse or vary
D the respondents' decision made on 24 May 2001.

**Submission Of The Appellant Before Us**

**[6]** In dealing with the rejection of the appellant's proof of debt learned counsel said that the court is not bound by the
E respondents' decision. He referred to *Halsbury's Laws of England*, 4th edn, vol 7 which says at p 745:

> The court decides on the merits on the evidence before it: its function is not that of deciding merely whether the rejection was right or wrong on the evidence available to the liquidator.

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In further support he referred to the case of *Re: Kentwood Constructions Ltd.* [1960] 2 All ER 655 where Buckley J said at p. 656:

G > When an application was made to the court to reverse such a decision of a liquidator, evidence was filed which was commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof, and the court was bound to decide the rights of the claimant in the light of the evidence which was before the court and not merely to express a view on
H whether the liquidator was right or wrong in rejecting the proof when he rejected it. … It was not merely the function of the court to say that a decision was right or wrong; it might vary the decision in any way that it thought necessary in the light of the evidence before the court. The court must approach the question
I de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor.

Learned counsel also referred to the Singapore case of *Re: Teck Hock & Co. (Pte) Ltd.; Morgan Guaranty Trust Co. of New York v. Wong Tui San & Anor* (CSLR) XX [5132] where in citing *Re: Kentwood Constructions Ltd.* [1960] 2 All ER 655 Coomaraswamy J said in his judgment:

> My decision is that the applicants' proof should be admitted as I am satisfied that in the circumstances Stearn's statutory declaration is sufficient to establish the sums claimed.

Learned counsel said that there was sufficient evidence to show that the respondents had admitted that the loan was given by the appellant to LSSB. They are:

(a) The respondents did not deny in their affidavits that the appellant had given the loan to LSSB.

(b) The affidavits affirmed by Tan Miang Kieng, exhibited to the respondents' affidavits and which were used by the respondents, also did not deny that the loan was given by the appellant to LSSB.

(c) The documentary evidence clearly showed that LSSB had applied for and had received the loan from the appellant.

(d) There was no affidavit from Tan Eam Thong to support the allegation that he was the beneficiary of the loan. However, on the contrary, there was an e-mail from Tan Eam Thong to state otherwise.

(e) If the loan was in fact given to Tan Eam Thong, the respondents did not explain in their affidavits the reason why the appellant's name appeared in LSSB's statement of affairs.

It was also submitted that the appellant did not breach any of the provisions of the Moneylenders Act 1951 and the loan agreement was therefore valid with the result that the debt can be enforced.

**Submission Of The Respondents Before Us**

**[7]** Learned counsel for the respondents submitted that it was the understanding between all parties that the loan was taken for the benefit of third parties and that LSSB's role was only to act as an intermediary to arrange for the loan. Pursuant to this understanding, the appellant would furnish loans to the clients of LSSB and the clients were required to charge the shares

purchased by them to the appellant. The appellant was aware that the loan facilities were for the benefit of third parties. This is supported by a letter from Tan Eam Thong addressed to Steuben Capital Investment (Singapore) Pte. Ltd. which stated in clear terms that he was the true beneficiary of the loan facilities. It was further submitted that LSSB was not the real borrower in respect of the loan facilities for the following reasons:

(a) The appellant had offered to execute a new agreement to replace the letter of offer in order to show that the real borrower was Utama Impian Properties Sdn. Bhd. which was the nominee of the actual borrower;

(b) The appellant had requested LSSB to execute a corporate guarantee in favour of the appellant as security to which LSSB did not agree;

(c) The appellant had also requested LSSB to obtain further securities from the clients who were the real borrowers;

(d) Averments were made in the affidavit affirmed by Tan Miang Kieng that the real borrowers were the appellant's own companies, Compstate Sdn. Bhd., Top Venue Sdn. Bhd. and Bakti Barat Sdn. Bhd.; and

(e) LSSB's Audited Accounts for the years 1997 and 1998 did not reflect any credit of money and/or payment of money from the appellant to LSSB.

Learned counsel also referred to the following documents to support his submission that the respondents had correctly rejected the appellant's proof of debt:

(a) A facsimile transmission dated 14 July 1997 from the appellant to Sime Bank Berhad, Geylang, Singapore which showed that the bank was requested to expedite the letter of offer with regard to an overdraft facility for Steuben Capital Investment (Singapore) Pte. Ltd. for a sum of SGD 5million secured against acceptable shares by the bank to enable the appellant to instruct LSSB to transfer the shares of Rapid and Instangreen Corporation Berhad;

(b) A facsimile transmission dated 16 October 1997 from the appellant to LSSB which showed that the appellant through his solicitors had made a fresh agreement which would supersede the letter of offer and which would reflect Utama Impian Properties Sdn. Bhd. as the real borrower;

(c) A facsimile transmission dated 13 October 1997 from the appellant to LSSB which showed that the appellant's company was actually the real lender;

(d) A letter from the appellant to Tan Miang Kieng dated 4 December 1997 which showed that the appellant had made a request for the latter to obtain from the real borrowers additional securities such as land and properties in Kuala Lumpur, Pulau Pinang or Bukit Mertajam;

(e) Transfer of Shares Confirmation Report which showed that there were transfers of various amounts of shares to Sime Nominees Pte. Ltd. by the actual receivers of the loan facilities namely Compstate Sdn. Bhd., Top Venue Sdn. Bhd and Bakti Barat Sdn. Bhd.; and

(f) A letter from Tan Eam Thong addressed to Steuben Capital Investment (Singapore) Pte. Ltd. for the attention of the appellant which stated that he was the beneficiary of the loan facilities.

**[8]** Learned counsel contended that the onus of proof to show that the respondents' decision was wrong was on the appellant. In support reference was made to cases such as *Westpac Banking Corporation & Others v. Totterdell and Another* [1998] 25 ACSR 769 at pp. 772 to 773 and *Tanning Research Laboratories Inc. v. O'Brien* [1990] 169 CLR 332. He said that the appellant had failed to produce evidence to show that the loan facilities given by him were for the use and benefit of LSSB. Accordingly, it was submitted, the learned judge was right in dismissing the appellant's proof of debt.

## Decision Of This Court

**[9]** The duty of the liquidator in making a decision and the right of a party to seek a court order to reverse or vary the decision is governed by r. 92 and r. 93 of the Rules which read as follows:

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92. The liquidator shall examine every proof of debt lodged with him and the grounds of the debt, and shall in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing in Form 59 to the creditor the grounds of the rejection.

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93. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the

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decision of the liquidator in a winding-up by the Court shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of service of the notice of rejection.

**[10]** It must be observed that this appeal is essentially grounded

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on the finding of facts made by the learned judge. Common law cases indicate that the courts are reluctant to interfere with the decision of a liquidator and will do so only if it is so unreasonable and absurd that no reasonable person would have acted in that way. In this regard reference may be made to *Re Edennote Ltd.*

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[1996] 2 BCLC 389 where Nourse LJ said at p. 394:

> In general there seems to be something unrealistic in judging the propriety of the acts and decisions of a businessman by asking whether he took into account something he ought not to have

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taken into account or failed to take into account something he ought to have taken into account.

> That said, it is certainly possible for a liquidator to do something so utterly unreasonable and absurd that no reasonable man would have done it, simply by selling an asset of the company without

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taking into account the possibility that a third party might well have made a better offer than he to whom it was sold.

The court will not interfere with the decision simply because its opinion might differ from that of the liquidator. Generally, the court will recognize that the discretion has been vested by statute

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in the liquidator and will not interfere unless it is shown that he did not address himself to the correct questions or has made errors of law (see *Avon Downs Pty. Ltd. v. FC of T* [1949] 78 CLR 353; *Re Mineral Securities Ltd.* [1973] 2 NSWLR 207) or has not exercised his discretion *bona fide* or has acted in a way in

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which no reasonable liquidator would have acted (see *Leon v.*

*York-O-Matic* [1966] 1 WLR 1450) or has taken into account entirely irrelevant considerations (see *Yeomans v. Walker & Anor* [1986] 10 ACLR 753) or when there is fraud.

**[11]** The learned judge had taken into consideration the various documents tendered by both parties to support his conclusion that LSSB did not take the loan for its own benefit. In particular he had considered LSSB's audit reports which are a requirement of law for the years 1997 and 1998 to show the movement of the company's financial activities. They did not reveal any loan taken from the appellant as opposed to LSSB's statement of affairs which did so. But he rightly ruled that they are merely statements made by the company's directors on the company's asset and liabilities. He said correctly that the status of the statement of affairs was not the same as that of the company's audit reports which were audited by a professional auditor. The absence of the loans in the audit reports as explained by the respondents in their affidavits and the exhibits annexed shows that there was an understanding between LSSB and the appellant that the loan was taken for the benefit of LSSB's clients. In particular, exhs. "TMK3" and "TMK6" annexed to exh. "OWC3" in the affidavit affirmed by the first respondent on 8 Jun 2001 (hereinafter referred to as "the respondent's affidavit") reveal that the appellant had knowledge that the loans were taken for the benefit of third parties and that they were to charge their shares as security which they did. In this regard a facsimile transmission dated 4 December 1997 from the appellant to Tan Miang Kieng, exhibited as exh. "TMK7" annexed to exh. "OWC3" in the respondent's affidavit, shows that the appellant had in fact asked for additional securities such as land in Kuala Lumpur, Pulau Pinang and Bukit Mertajam to be provided by the third parties. The relevant part of the facsimile transmission reads as follows:

> M K Tan - ...
>
> > Officially, I have recalled both loans and gave you till 10/12/97 to pay up (if possible) before the next rollover and on the other hand, if you are sincere, get your client to give me other securities such as land, properties in KL, Penang or Bukit Mertajam and I will discuss with my lawyer Yim Seong and reconsider my official stand which remains unchanged for the time being. ...
>
> ...
>
> Regards
>
> Chuah

A As a matter of fact exhs. "AC6" and "AC7" in the affidavit affirmed by the appellant on 16 May 2001 reveal that with regard to the loan of USD3.8 million the securities furnished by the third parties had been taken into account by the appellant in calculating the amount due. Thus, the real borrowers are the third parties of
B which the appellant was aware. It is therefore clear that LSSB acted only as an agent for the real borrowers to the knowledge of the appellant. There is therefore privity of contract between the real borrowers, who are the principals, and the appellant. In accordance with the principle of law in *Montgomerie and Others v.*
C *United Kingdom Mutual Steamship Association* [1891] 1 QB 370 such a contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal. This rule is embodied in s. 183 of our Contracts Act
D 1950 and was considered in *Plantation Agencies Sdn. Bhd. v. Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219. LSSB is thus not a debtor of the appellant.

**[12]** The proof of debt filed by the appellant is therefore without
E any merit. Accordingly, we dismissed the appeal with costs.

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